

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

MICHAEL D. VAN DEELEN,

Plaintiff,

v.

**SHAWNEE MISSION UNIFIED
SCHOOL DISTRICT #512, KARL
KRAWITZ, and KEITH BURGAT,**

Defendants.

CIVIL ACTION

No. 03-2018-CM

MEMORANDUM AND ORDER

Plaintiff Michael D. Van Deelen, appearing pro se, brought suit against defendants Shawnee Mission Unified School District #512 (the School District defendant), and Karl Krawitz and Keith Burgat (the individual defendants), alleging violations of the First and Fourteenth Amendments to the United States Constitution. On February 18, 2004, this court granted summary judgment to defendants and, on February 19, 2004, entered judgment accordingly.

On May 14, 2004, plaintiff filed a Motion to File Supplemental Pleadings (Doc. 151).

Federal Rule of Civil Procedure 15(d) provides:

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Fed. R. Civ. P. 15(d). The decision whether to grant or deny a motion to allow the filing of a supplemental pleading is within the trial court's discretion as set out in Rule 15(d). *Gillihan v. Shillinger*, 872 F. 2d 935, 941 (10th Cir. 1989). A court should grant leave to supplement the complaint liberally as construed under Rule 15, unless a good reason exists to deny leave, such as prejudice to the defendant. *Id.*

Plaintiff's supplemental pleading sets forth events that have occurred since the filing of plaintiff's complaint. However, judgment was entered against plaintiff on February 19, 2004, which prevents the court from granting leave to file this supplemental pleading.¹ *Planned Parenthood of Southern Arizona v. Neely*, 130 F.3d 400, 403 (9th Cir. 1997); *Massengale v. Oklahoma Board of Examiners in Optometry*, 30 F.3d 1325, 1331 (10th Cir. 1994). Plaintiff's Motion for Leave to File Supplemental Pleading (Doc. 151) is therefore denied.

On May 27, 2004, plaintiff filed a Motion to Reopen Time for Appeal (Doc. 152). In support, plaintiff states that he did not receive a notice of the court's order dismissing the action. In fact, plaintiff states that he learned of the dismissal on May 25, 2004, while searching on the internet.

Rule 4(a)(6) provides "a limited opportunity" for relief under specific circumstances. *See* Fed. R. App. P. 4(a)(6), advisory committee's note. Rule 4(a)(6) permits a district court to

¹Exceptions exist which permit a supplemental pleading to be filed following a final judgment. However, none of these exceptions apply in these circumstances. *See Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218 (1964) (permitting a supplemental pleading by plaintiff where plaintiff alleged that defendant violated court's earlier ruling and where the district court had retained jurisdiction over the case).

reopen the time for appeal for 14 days, if the court finds that a party entitled to notice of a judgment or order did not receive such notice within 21 days of its entry, no party would be prejudiced, and a party files a motion requesting the extension of time within 180 days of entry of the judgment or order, or within seven days of receipt of such notice, whichever is earlier.

Non-receipt is difficult to prove conclusively. However, plaintiff's specific factual denial of receipt, coupled with the fact that plaintiff filed a motion to supplement his pleading, which plaintiff claims he filed not knowing the action already had been dismissed, convinces this court that plaintiff in fact did not receive notice of the dismissal.

Having made this finding, the court concludes that Rule 4(a)(6)'s requirements have been satisfied: Plaintiff did not receive notice within 21 days of the court's entry of judgment, no party would be prejudiced, and plaintiff filed the instant motion requesting the extension of time within 180 days of entry of the judgment. Accordingly, the court grants plaintiff's request. The court hereby reopens the time to file an appeal for a period of 14 days from the date of this order.

IT IS THEREFORE ORDERED that plaintiff's Motion to Reopen Time for Appeal (Doc. 152) is granted, and plaintiff's Motion to File Supplemental Pleadings (Doc. 151) is denied.

IT IS FURTHER ORDERED that the clerk send a copy of this order to plaintiff via certified mail, return receipt requested

Dated this 16 day of June 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

